GMX ASSOCIATES PTE LTD & ANOR *a*

v.

LEE YEW POOI

HIGH COURT MALAYA, KUALA LUMPUR *b*
STEVE SHIM J
[CIVIL SUIT NO: D5-22-1447-1997]
5 MARCH 1998

CIVIL PROCEDURE: *Anton Piller order - Setting aside - When ought application to set aside Anton Piller order be made - Whether O. 29 r. 1(2B) Rules of the High Court 1980 applies - Whether application to set aside must be made within two weeks from granting of Anton Piller order - Whether delay in applying to set aside has adverse effects* *c*

This was an application by the defendant to set aside an *ex parte* order obtained by the plaintiffs against him. The *ex-parte* order, except for one particular order therein, was in effect Anton Piller orders. Counsel for the plaintiffs, relying on O. 29 r. 1(2B) of the Rules of the High Court 1980 ('the RHC'), raised a preliminary objection contending that the defendant's application was a non-starter as the *ex parte* order had already lapsed and as such there was nothing to be set aside. *d* *e*

Held:

[1] The provisions of O. 29 r. 1(2B) of the RHC relate specifically to interim injunctions and cannot be construed to include Anton Piller orders. *f*

[2] In the case of interim injunctions, the provisions of O. 29 r. 1(2B) of the RHC apply and any application to revoke or set aside an *ex parte* injunction has to be done within two weeks from the grant of the said injunction. However, this two week limitation does not apply to an Anton Piller order, although effluxion of time may weigh against the discharging of such an order. *g*

[3] An application for discharge or to set aside an Anton Piller order must be made within a reasonable time after the grant of the order. What is a reasonable time is a question of fact to be decided by the court upon the particular facts and circumstances of the case. *h*

[4] On the evidence, facts and circumstances presented to the court, there were no merits in the defendant's application to persuade the court to discharge or set aside the Anton Piller orders.

[Application dismissed with costs.] *i*

Case(s) referred to:
Booker McConnell plc & Anor v. Plascow & Ors [1985] RPC 425 ***(refd)***
Caterpillar Tractor Co v. Hock Guan (1960) Sdn Bhd [1988] 1 CLJ 787 ***(refd)***
Columbia Pictures Industry Inc v. Robinson [1987] Ch 38 ***(refd)***
Elias Mooin & Anor v. Dato' Zainal Abidin Johari [1997] 3 AMR 238 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 29 r. 1(2B)

For the plaintiffs - Brada Chong; M/s Lee Ong & Kandiah
For the defendant - Thye Yan Mee; M/s Shook Lin & Bok

Reported by Ling Hea Hoon & S Dharmendran

JUDGMENT

Steve Shim J:

This is an application by the defendant to set aside the *ex parte* order dated 31 December 1997 (encl. 4) obtained by the plaintiffs. It is supported by the defendant's affidavit affirmed on 23 January 1998. The plaintiff have opposed the application, filing an affidavit affirmed on 9 February 1998 by one Felicia Choo Kam Pin, the general manager of the 2nd plaintiff. In response to this affidavit, the defendant filed a further affidavit affirmed by him on 20 February 1998 (encl. 14).

Before hearing the merits of the application, learned counsel for the plaintiffs raised a preliminary objection. She contended in effect that the defendant's application was a non-starter because at the time of the said application, the *ex parte* order had already lapsed, that it had automatically expired or lapsed on 13 January 1998 and as such there was no longer any interim injunction to be set aside and consequently the other reliefs sought for must suffer the same fate. Herein, she relied on the provisions in O. 29 r. 1(2B) rules of the High Court 1980 which stipulates:

> Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall be automatically lapsed at the end of two weeks from the date it is granted.

She also relied on the the case of *Elias bin Mooin & Anor v. Dato' Zainal Abidin bin Johari* [1997] 3 AMR 2884, in particular to that part of the judgment of James Foong, J which states.

> By the calculation specified under Order 42 r. 7(1) and (2) RHC, the *ex parte* injunction terminated on March 30, 1995. Thus, when the said Judge ordered the application for extension to be struck off on April 10, 1995, there was in fact no order to be effected upon. Consequently, without the *ex parte* injunction order then in existence there can be no issue on damages since the *ex parte*

> injunction order had automatically lapsed without any challenge by the defendant. The defendant without putting forward any application to revoke or set aside this *ex parte* injunction within the period of 2 weeks upon its granting must have accepted that this *ex parte* interim injunction was properly taken out. When this is so, he must be excluded from claiming damages for the period when it existed.

At the outset, let me state that on the face of the *ex parte* application taken out by the plaintiffs, it does not disclose under which particular rules of the High Court it is taken out, although the affidavit in support, in certain paragraphs therein, give some indication that perhaps the application is taken out under O. 29 Rules of the High Court. If so, they may only relate to prayer (4) of the said application which clearly seeks an injunctive relief whereas the other prayers are more in the nature and form of an Anton Piller redress. In the absence of any clear, precise and definite indication, I am entitled to take the stand that the plaintiffs have taken out the said application under the inherent jurisdiction of the court. It is therefore within such perspective that I should fairly consider this preliminary objection.

Now, in countering the plaintiffs' proposition above, Miss Thye, counsel for the defendant submitted that the orders contained in the *ex parte* Order dated 31 December 1997 were, except for Order (5) therein, in effect Anton Piller orders and therefore the common law position would apply. I tend to agree. In my view, the provisions of O. 29 r. 1(2B) Rules of the High Court are clear enough. They relate specifically to interim injunctions. Nothing can be construed therein to include Anton Piller orders. That being the position the case cited by Miss Thye, that is, *Caterpillar Tractor Co v. Hock Guan (1960) Sdn Bhd* [1988] 1 CLJ 787 is not entirely irrelevant, in particular that part of the judgement of M Shankar, J which states:

> The next issue is whether, having already taken other steps in the action ... they can apply to set aside the *ex parte* order. The law here is that a party can apply at any stage to set aside an *ex parte* order. As Scott, J said in *Columbia Picture Industry & Ors v. Robinson & Ors* [1986] FSR 367 at p. 449:
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> > It has always been my understanding that an interlocutory application to set aside or vary an interlocutory order can be made on due notice at any time ... But the respondent to an *ex parte* order, who *ex hypothesi*, has not been heard at all on the application for the order, can, in my view, make an interlocutory application at any time for a review of the order ...

The *Caterpillar Tractor* case was also concerned with an application to set aside part of an Anton Piller order. Shankar, J obviously mindful of the draconian effect such an order could create, concluded thus:

> The crux of the case here is whether a court should pre-empt the defendants merely on the basis of complaints from the plaintiffs and so proceed to make orders which may have the effect, if not actually of putting the defendants out of business or causing maximum disruption to his trading activities. And all this before he has a fair opportunity of being heard in his own deface.

His Lordship, in the course of judgment, also made reference to the English case of *Booker McConnell plc & Anor v. Plascow & Ors* [1985] RPC 425. It is perhaps pertinent to note that in that case, the court of appeal, in dealing with the issue of retrospective discharge of fully executed Anton Piller orders stated, at one stage:

> That case was considered in another decision of this court to which we were referred, *Randolph M Fields v. Alison Watts,* The Times 22 November 1984. It concerned an Anton Piller order against certain members of the Bar. They applied to have it discharged after it had been executed, though parts of the order remained to be complied with in particular the swearing of an affidavit. The judge at first instance declined to set the order aside but an appeal to this court was allowed.

Though the authorities have established that in appropriate cases, the court has the power to discharge Anton Piller orders even after they have been executed, it is however unclear as to when the application for such discharge ought reasonably to be done. In the case of interim injunctions, as I have said, the provisions of O. 29 r. 1(2B) Rules of the High Court apply. And from the decision in *Elias bin Mooin & Anor, supra*, it would seem that any application to revoke or set aside an *ex parte* injunction has to be done within two weeks from the grant of the said injunction. In my view, this two week limitation does not apply to an Anton Piller order, although of course effluxion of time may weigh against discharge of such an order. This is quite evident in the case of *Columbia Pictures Industry Inc v. Robinson* [1987] Ch 38 where there was an application to discharge an Anton Piller order which had apparently been executed some years previously. In that case, the court refused the application on the ground of material non-disclosure by the plaintiff. In my view, any such application for discharge or to set aside an Anton Piller order must necessarily be made within a reasonable time after the grant of the order. What is a reasonable time is a question of fact to be decided by the court upon the particular facts and circumstances of the case.

In the circumstances and for the reasons stated, I hold that although the preliminary objection is sustainable as against Order (5) of *ex parte* order dated 31 December 1997, it cannot stand as against the Anton Piller orders therein.

I come now to the merits of the defendant's application. It seems clear that it presented a three-fold thrust. First, Miss Thye, counsel for the defendant submitted that the plaintiff had failed to establish there was any real risk or grave danger that the defendant would destroy or dissipate material evidence. She contended that the defendant was, at all material times, operating a long and established business openly, making no attempt to trade secretly or surreptitiously; that he had purchased and sold different types of films including "V-KOOL" films. I do not think that the mere fact of doing business openly should constitute an automatic defensive valve, disproving or dispelling the notion that a person cannot, under any circumstance, destroy material evidence. That would be a misconception. It would certainly depend on the nature of the business as well as the items concerned. Here, the plaintiffs had reiterated that the "V-KOOL" films and the relevant documents were items quite easy to conceal in the shop since the shop was fully operated and controlled by the defendant and his family. It was a family business dealing with different types of goods. They alleged that at one stage during the execution of the court order, the defendant's wife and son had refused to divulge certain relevant information to the plaintiffs' solicitors. It is, I think, quite reasonable to assume that the items subject matter of the order, are rather small items and therefore easily disposable. Hence, there is every possibility of a real risk of such items being destroyed or dissipated in the circumstances, I do not think Miss Thye's proposition above carries any weight.

Secondly, Miss Thye contended that there was no full and frank disclosure by the plaintiffs in applying for the Anton Piller orders. In this regard, she said that the plaintiffs did not, in their affidavit, disclosure the true nature of the defendant's business. I do not think this is quite correct. The defendant's business is succinctly stated in exh. "FC-6" annexed to the supporting affidavit filed by the plaintiffs. She further alleged that the plaintiff had given a wrong impression to the court that the defendant was operating a large scale business secretly or surreptitiously. There is nothing in the supporting affidavit to indicate or suggest any such impression. She then said that the plaintiffs' had failed to disclosure in their affidavit that the defendant was the authorised dealer for "SUN-GARD" films and that "V-KOOL" and "SUN-GARD" were competitors. Even if there is some truth in this, I do not think they can be regarded as material non-disclosures.

Thirdly, Miss Thye submitted that the plaintiffs' solicitors had acted oppressively in the execution of the orders. Having gone through the affidavits and the exhibits annexed thereto, I can find nothing to indicate or suggest that the plaintiffs' solicitors were behaving in a high-handed manner in executing the court orders. Miss Thye's submission on this score has no merit whatsoever. In any case, the plaintiffs have undertaken to pay damages in the

event the items are found to be damaged and they have demonstrated their financial ability to do so. There was some mention by counsel that the defendant's reputation would be adversely affected. In my view, that too could be compensated by way of damages if sustainable.

In summary therefore, on the evidence, facts and circumstances, I am not persuaded by the defendant that the grounds relied upon are sufficient enough to discharge or set aside the Anton Piller orders in *ex parte* order dated 31 December 1997. Accordingly, I dismiss the application with costs to be taxed unless agreed.